IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 94 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE A.M.KAPADIA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

DHANSUKHBHAI BALWANTRAI MODI

Versus

STATE OF GUJARAT

Appearance:

1. Special Criminal Application No. 94 of 2004

MR AD SHAH for Petitioner No. 1

MR. V.M.PANHOLI, APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE A.M.KAPADIA

Date of decision: 29/07/2004

ORAL JUDGEMENT

By filing this petition under Article 226 of the Constitution of India, petitioner, who apprehends his arrest in connection with the offence registered vide CR

No. 129 of 2004 at Prohibition Police Station, South Zone, Surat City for commission of the alleged offences punishable under Sections 66 (1)(b) and 65(e) (a) as well as 83 read with 116B of the Bombay Prohibition Act (for short 'BP Act'), has prayed to issuance of writ of mandamus and/or other appropriate writ directing the Investigating Officer of Prohibition Station, South Zone, Surat City, not to effect arrest of petitioner in connection with the said Crime.

2. The Prohibition Inspector J.K.Rathod of South Zone Prohibition Station, Surat City is investigating Crime Register No. 129 of 2004 for the offence punishable under Sections 66(1)(b) and 65(e) (a) as well as 83 read with 116B of the BP Act. The Police Inspector has registered the complaint of one Dilipsingh Juvansingh, Police Constable of Prohibition & Excise, Striking Force on 10.1.2004 at 3:05 p.m. It is the case of the prosecution, that there was previous information about prohibited liquor bottles being brought in Surat in one Maruti Esteem Car No. GJ-5N-2342. It is the case of prosecution that the members of the raiding party were waiting for arrival of the said Esteem Car at the stipulated place. It is the prosecution case that they had noticed such a car entering the area and driver of the vehicle, sensing the presence of police, drove the said car speedily when he was given signal to stop. It is the prosecution case that the members of the raiding party chased the said vehicle and the driver of the said vehicle had to stop his car on account of puncher of tyre and he escaped by leaving the car in Kutcha road. It is the prosecution case that members of the raiding party reached near the car and found the driver disappeared. The search of the said car was carried out in presence of panchas and prohibited articles such as Whisky and Brandy bottles were found in boxes, the value of which was about Rs.1,22,520. It is the case of prosecution that the car was seized under a Panchnama and on making due inquiry it was found that one Sureshbhai Rameshchandra Tailor was owner of the said car. The police arrested said Sureshbhai Rameshchandra Tailor on 12.1.2004 and produced him before the Court of Judicial Magistrate, First Class, at Surat. The police also submitted application for remand of the said accused on that day and he was remanded to police custody up to 15.1.2004. The accused Sureshbhai Rameshchandra Tailor has given name of one Dansukhbhai Modi. The police officer called upon the said accused to give full name and address of Dhansukhbhai Modi, but according to the remand report, the accused had not given such information. According to the petitioner he is not involved in the commission of

the alleged offence. However, it appears that accused Sureshbhai is being compelled to disclose the name of the petitioner and thereby the police is trying to involve the petitioner. There is no material independent other than the so called statement of accused Sureshbhai to implicate the petitioner. According to the petitioner, the said statement is purported to have been made during police interrogation and no full name and address has been given. The petitioner apprehends that on the basis of the statement of the main accused, he will be booked and arrested in the said offence which, according to him, is hit by Section 25 of the Indian Evidence Act ('the Act' for short) as well as Section 162 of the Code of Criminal Procedure ('the Code' for short). He, therefore, prayed for the reliefs to which the reference is made earlier.

3. The sole contention advanced by Mr. A.D.Shah, learned advocate of the petitioner, is that investigating officer is trying to arrest the petitioner only on the basis of the statement of the accused, which according to him, is hit by Section 25 of the Act as well as Section 162 of the Code, and therefore, police has no right to arrest the present petitioner. If the police arrests the present petitioner, the petitioner's right guaranteed under Article 21 of the Constitution of India would be infringed, and therefore, he urged to allow this petition. In support of his aforesaid submissions, he cited the following Judgements/decisions:

(i) Judgement and Order dated 18.01.2002 passed by this Court (Coram: C.K.Buch, J) in Criminal Misc. Application No. 7323 of 2001.

(ii) (2003) 8 SCC 50 - State of Gujarat v. Salimbhai Abdulgaffar Shaikh and others.

(iii) AIR 1994 SC 1349 - Joginder Kumar v. State of U.P. and others.

4. Mr. V.M.Pancholi, learned APP appearing on behalf of the respondent-State of Gujarat, has vehemently opposed the submissions made by Mr. A.D.Shah, learned advocate of the petitioner, and contended that the petitioner has alternative remedy to file an application seeking anticipatory bail before the competent court which he has not availed of and straightway approached this Court by filing petition under Article 226 of the Constitution of India. Therefore, such powers cannot be exercised in favour of the petitioner. He also contended that even statement of the co-accused can certainly be

considered as a clue while interrogating him further or other persons arrested or interrogated during the course of investigation. It is too premature to say that on the basis of the statement of the co-accused, petitioner cannot be convicted. In support of the aforesaid submissions, Mr. Pancholi has placed reliance on a reported decision in the case of Mohmed Salim Abdul Rasid Shaikh v. State of Gujarat, 2001 (2) GLR page 1580. He, therefore, urged that on the aforesaid premise this petition lacks merit and deserves to be rejected.

5. I have considered the submissions advanced by learned advocates appearing for the parties and also perused the averments made in the petition and the FIR which is recorded at Prohibition Police Station, South Zone, Surat City for commission of the alleged offences under the BP Act as well as various judgements cited at the bar.

6. There is no manner of doubt that the prayer made by the petitioner in this petition is in the nature of anticipatory bail as envisaged under Section 438 of the Code. It is also settled principle of law that when the alternative remedy is available, petition filed under Article 226 of the Constitution of India cannot be entertained, as the power under Article 226 of the Constitution of India is plenary and discretionary. Besides this, there is no question of violation of the fundamental rights envisaged under Article 21 of the Constitution of India. When there is an FIR for commission of the offences punishable under the BP Act, if at this stage this Court entertains the petition, it would tantamount to interference in the sphere of the police investigation. There is no law which prevents the investigating officer from arresting the petitioner and putting him to trial on the basis of the statement of the co-accused. It is also settled principle of law that the power under Article 226 of the Constitution of India or under Section 482 of the Code cannot be invoked to circumvent the power under Section 438 of the Code which exclusively deals with in the sphere of granting of anticipatory bail. In the instant case, the petitioner has not invoked the power under Section 438 of the Code and straightway approached this Court by filing petition under Article 226 of the Constitution of India which cannot be entertained. The petitioner is also unable to show how his fundamental right would be infringed if the relief prayed for by him in this petition is not granted. According to this Court, if the relief prayed for in this petition is granted, it would tantamount to interference in the sphere of police who is investigating the offence

on the basis of the statement of the co-accused.

7. The Supreme Court in the case of State of Gujarat v. Salimbhai Abdulgaffar Shaikh and others (supra), in para 16 has observed as under:

> "The High Court has also invoked powers under Section 482 CrPC while granting bail to the respondents. Section 482 CrPC saves the inherent power of the High Court. The High Court possesses the inherent powers to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone courts exist. The power has to be exercised to prevent abuse of the process of the court or to otherwise secure the ends of justice. But this power cannot be resorted to if there is a specific provision in the Code for the redressal of the grievance of the aggrieved party. (See Madhu Limaye v. State of Maharashtra.) There being a specific provision for grant of bail, the High Court clearly erred in taking recourse to Section 482 CrPC while enlarging the respondents on bail."

8. This court in the case of Mohmed Salim Abdul Rasid Shaikh v. State of Gujarat (supra) has observed that; irrespective of the fact that statement of co-accused to police is not admissible in evidence before the Court, but police can certainly consider that statement as a clue while interrogating him further or other persons arrested or interrogated during the course of investigation. Premature stage of investigation cannot be ignored, and anticipatory bail, as a matter of course, should not be granted.

9. Applying the principle laid down by the Supreme Court in the case of State of Gujarat v. Salimbhai Abdulgaffar Shaikh and others (supra) to the facts of the present case, invocation of the power under Article 226 of the Constitution of India by the petitioner is nothing but a mere abuse of process of this Court and the petitioner has invoked that extra ordinary jurisdiction notwithstanding the fact that Section 438 of the Code is in the statute book which he could have very well invoked while seeking anticipatory bail. Therefore, according to this Court, while rejecting the present petition, the petitioner must be saddled with heavy cost.

10. For the foregoing reasons, the petition fails and accordingly it is rejected. Rule is discharged. Interim

relief granted at the time of issuance of rule shall stand vacated.

11. Petitioner is directed to deposit the cost, which is quantified at of Rs.25,000.00 with the Registrar of this Court within a period of four weeks hereof failing which the Registrar is ordered to take appropriate steps for recovery of the same under the provisions of Bombay Land Revenue Code.

12. At this stage, Mr. A.D.Shah, learned advocate of the petitioner, prays that the interim relief granted by this Court at the time of issuance of Rule may be continued for a further period of four weeks to enable the petitioner to approach higher forum.

13. While rejecting the petition this Court has merely followed the decision of the Apex Court in the case of State of Gujarat v. Salimbhai Abdulgaffar Shaikh and others (supra) wherein it is held that when there is a specific provision envisaged under the Code for seeking the bail, powers under Section 482 cannot be invoked. In the instant case, the petitioner has invoked the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India to circumvent the provisions of Section 438 of the Code. Therefore, this Court has rejected the petition, and in that view of the matter, the prayer made by the learned advocate for the petitioner cannot be accepted and the same is rejected.

(A.M.Kapadia,J)

Jayanti*